No. 66

In the Supreme Court of the United States

OCTOBER TERM, 1952

MARCEL MAX LUTWAK, MUNIO KNOLL, AND REGINA TREITLER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The original opinion of the Court of Appeals (R. 391-400) and its supplemental opinion on rehearing (R. 404-414) are reported at 195 F. 2d 748.

JURISDICTION

The judgments of the Court of Appeals were entered January 3, 1952 (R. 401-403). A petition for rehearing was denied on April 16, 1952 (R.

415). The petition for a writ of certiorari was filed May 16, 1952, and was granted October 13, 1952 (R. 422). The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether evidence of conduct of some conspirators—relevant to the material issue whether certain representations, for which all the conspirators were responsible, were fraudulent—was admissible against all the conspirators.

2. Whether the separations of the purported spouses after entry into the United States and the arrangements to sever the purported marriages were part of the conspiracy so as to make evidence proving these matters admissible against all the conspirators.

3. Whether, upon the trial judge's conclusion from overwhelming testimony that a marriage was a sham (never consummated, never followed by cohabitation, and intended to be severed when it had served the purpose of effecting an alien's entry into the United States under the War Brides Act), a witness was properly permitted to testify against her purported husband.

4. Whether, where a disputed issue of fact bears on the competency of a witness and is also a material issue in the lawsuit, and where the judge has resolved the issue in favor of competency on evidence other than that witness' testimony, the witness is nevertheless incompetent to testify on that issue.

5. Whether the prosecution—having proved that the marriages were contracted solely for the purpose of effecting the entry of the aliens into the United States, and having proved that the facts of the scheme were concealed and misrepresented to the immigration officials—was required to prove that the marriages were "invalid" under French law.

6. Whether, when he instructed the jury that a bigamous marriage is void, the trial judge was required in the circumstances of this case to charge further that a second marriage with an earlier spouse living is presumed to be valid.

STATUTES INVOLVED

Section 37 of the Criminal Code, 18 U. S. C. (1946 ed.) 88 (now 18 U. S. C. (Supp. V) 371):

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Act of December 28, 1945, c. 591, § 1, 59 Stat. 659, 8 U. S. C. 232:

> * * * notwithstanding any of the several clauses of section 3 of the Act of February 5, 1917, excluding physically and mentally defective aliens, and notwithstanding the docu-

mentary requirements of any of the immigration laws or regulations, Executive orders, or Presidential proclamations issued thereunder, alien spouses or alien children of United States citizens serving in, or having an honorable discharge certificate from the armed forces of the United States during the Second World War shall, if otherwise admissible under the immigration laws and if application for admission is made within three years of the effective date of this Act, be admitted to the United States * * *.

Act of March 4, 1929, § 2, 45 Stat. 1551, 8 U. S. C. 180a:

> Any alien who hereafter enters the United States at any time or place other than as designated by immigration officials or eludes examination or inspection by immigration officials, or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall be guilty of a misdemeanor and, upon conviction, shall be punished by imprisonment for not more than one year or by a fine of not more than $1,000, or by both such fine and imprisonment.

Act of May 26, 1924, § 22(c), 43 Stat. 153, 165, 8 U. S. C. (1946 ed.) 220(c) (now 18 U. S. C. (Supp. V) 1546):

> Whoever knowingly makes under oath any false statement in any application, affidavit, or other document required by the immigration laws or regulations prescribed there-

under, shall, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both.

STATEMENT

The petitioners seek reversal of judgments of the Court of Appeals for the Seventh Circuit (R. 401-403) unanimously affirming the judgment of the District Court for the Northern District of Illinois imposing sentences of two years' imprisonment and fines of $10,000 on each of them (R. 366-367) upon the verdicts of the jury (R. 358-360) finding petitioners guilty as charged in the first count of a six-count indictment.[1] That count charged petitioners and two others, Leopold Knoll and Grace Klemtner,[2] with conspiracy to commit substantive offenses set forth in the remaining counts, and conspiracy to defraud the United States of and concerning its governmental functions and rights with respect to the immigration laws and the Immigration and Naturalization Service (R. 4-9). The conspiracy was alleged to have comprehended the following ostensible marriages in Paris: Marcel Lutwak to Maria Knoll, allegedly divorced wife of Munio Knoll; Bess Osborne to Munio Knoll; Grace Klemtner to Leopold Knoll.

It was alleged that a conspiracy was begun on or about July 1, 1947, under which Marcel Lutwak, Bess Osborne, and Grace Klemtner, all unmarried

[1] The remaining counts were dismissed for want of venue (R. 291, 302, 333).

[2] Leopold Knoll was acquitted (R. 361) and the indictment was dismissed as to Grace Klemtner (R. 224-225, 333).

citizens of the United States and veterans of the second world war, would journey to Paris and go through the form of a marriage ceremony with three aliens residing in Paris, as mentioned above; that the three aliens would then enter the United States as nonquota immigrants, falsely representing themselves in the applications for admission as being married, and concealing and "omitting to state to [the Immigration Service] at the time of making said application [their] intention and understanding that [they] would not be, or in fact live together," as man and wife but would sever the ostensible ties as they saw fit. It was further charged that, as a part of the conspiracy, the conspirators "would at all times subsequent to the formation of the said conspiracy conceal such transactions and acts aforesaid and would do such other, further and different acts as they might deem necessary and expedient to prevent the disclosure to the United States Immigration and Naturalization Service of the existence of said conspiracy" (R. 5-7, 10). The specified 21 overt acts covered a period from 1947 to 1950 and included, *inter alia:* conversations of Treitler in the late summer of 1947 with respect to obtaining spouses for the Knolls; the trips to Paris of the American alleged spouses and the going through the form of marriage ceremonies there; the entries into the United States; the residing together of Munio Knoll, ostensible husband of Osborne, and Maria, the ostensible wife of Lutwak; the conversation of Lutwak and Munio Knoll with Bess Osborne,

Munio's ostensible wife, in November 1947, in which the latter was paid $1,000; and the divorce on March 31, 1950, of Lutwak and his ostensible spouse, Maria (R. 7, 14, 30-32, 206).

At the trial, the Government's first witness, Anne Zapler, testified that in the late summer of 1947 petitioner Regina Treitler twice asked her whether she "knew of any girls who could go to Europe and marry her brother and bring him here to the States," the girl to have her way paid and to receive a fee and "at the end of the period of six months, they could be divorced and they would not have to consummate the marriage" (R. 29-31, 37-38). Later, Zapler had a conversation with Lutwak, a nephew of Treitler, regarding the same matter but she did not recall what it might have been (R. 31). In September 1947, Zapler introduced Bess Osborne to Lutwak, mentioning that Osborne was an ex-Wave (R. 31-33). Later in September, Treitler expressed her happiness over the fact that Osborne "had consented to go," upon the apparent assumption that the ex-Wave was to marry Leopold Knoll (R. 35).[3]

The Government's second witness, Maria Knoll, who had entered the United States as Lutwak's ostensible wife had been divorced by Lutwak before the trial (R. 69-70, 91-92). She had been married in 1932 to Munio Knoll, who was Lutwak's uncle (R. 60, 71-72), but Knoll's counsel interposed

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[3] The Zapler testimony was at first admitted only against Treitler and Lutwak, respectively (R. 30, 32, 35), but, upon further testimony of more witnesses, indicative of a conspiracy, was admitted against all the defendants (R. 141).

no objection to her testimony, contending that Maria had been validly divorced from Knoll in 1942 (R. 52). She testified on direct examination as follows:[4]

She first met Lutwak in Paris at the end of July or beginning of August 1947, being introduced to him by an uncle, as well as by Munio and Leopold Knoll, and by a cousin Charlotte (R. 60-61). She went through a civil marriage ceremony with Lutwak in Paris on August 31, 1947, in the presence of Munio Knoll and the cousin Charlotte (R. 60). She never received a wedding ring from Lutwak (R. 62). On September 9, 1947, she entered the port of New York as a bride of a United States serviceman; she signed the application for admission (Govt. Ex. 1),[4a] but the data therein were written out by Lutwak, including the representation that the "name and address of person to whom destined in the United States" was "Husband Max Marcel Lutwak, 3543 West Madison Street, Chicago" (R. 62-63, Govt. Ex. 1).

On September 10, she arrived in Chicago and resided with Regina Treitler at 35 South Central Park and another relative at 3532 West Adams for about three months. At no time during this period or any later period did Lutwak live in the same house or apartment with Maria. Munio Knoll lived at the Treitler home commencing with the middle of November 1947, during Maria's stay there. There-

[4] Her testimony was admitted as against all the defendants (R. 287).

[4a] The exhibits have not been printed in the record but have been filed in their original form with this Court.

after, Maria resided in Munio Knoll's apartment on Maypole Street, except for a few months spent in New York, until November 1948, and thereafter in New York until the date of the trial (R. 65-69).[5]

Wicker, owner of the Maypole Street property, testified that about Christmas of 1947 Treitler phoned her about an apartment, and later appeared there with Lutwak, Maria, and Munio Knoll. Maria was introduced as "Mrs. Lutwak" and she paid the rent for about two months. Thereafter, Munio Knoll "took the apartment" and resided there. Maria left the apartment at the time Knoll rented it, but returned a few months later. In the summer of 1948, when Maria and Munio Knoll visited the Wickers in South Haven, Michigan, they shared the same room overnight. (R. 139; 141-144).

Two business associates of Munio Knoll subsequent to his entry into the United States, Ludmer and Haberman, the former's wife being first cousin to Knoll, each testified that Treitler told them that she had "helped [Munio and Leopold Knoll] come to this country by getting girls and paying them off" and that she "paid off a thousand dollars each" (R. 93, 96-97, 118, 180).[6]

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[5] On cross-examination, Maria stated that she was acquainted with Lutwak for about four weeks before the marriage ceremony, that there had been a courtship, that she fell in love, that there was no talk in Paris of getting a divorce, that she lived with Lutwak as husband and wife at all of the Chicago addresses, that the marriage was "consummated" and that she had never lived with Munio Knoll as husband and wife after her marriage to Lutwak (R. 76-78, 82, 84-85, 90). The jury was entitled, of course, to disbelieve this testimony in view of Maria's direct testimony and the other evidence.

[6] The Treitler statements in the presence of Ludmer were made in a conversation which included Lutwak and Munio

In conversation with Haberman in New York in late November and early December 1947, Munio Knoll stated, in the presence of Lutwak, that he and Lutwak were awaiting the arrival of Leopold Knoll. He explained the speed of his own entry into the United States and that of Leopold as follows: "[W]hen you have the right connections and are willing to spend money you can pave your way very quickly." "You see how easy it is to come to the United States if you know how." (R. 151-153, 160). Knoll also referred to Maria as his wife, and Lutwak stated himself to be unmarried (R. 153).[7]

Ludmer considered the Maypole Street apartment, during January 1948 and the early part of February, as the residence of Maria and Munio Knoll (R. 94-95) and knew Maria as "Mrs. Knoll" (R. 103, 118). He picked up Knoll on the way to business almost daily and saw only Maria and Knoll at the apartment in the mornings (R. 104-105). On one Sunday in early February 1948, after an evening at the Treitlers', he took Maria to the Maypole Street address and Lutwak to "his home" at another address (R. 104).[8]

Knoll, and were admitted only against Treitler, Lutwak and Munio Knoll (R. 94, 283); the Treitler statement made to Haberman was admitted only against her (R. 180, 288).

[7] These conversations were admitted only against Munio Knoll and Lutwak (R. 152, 167, 174).

[8] There was testimony, admitted only against Munio Knoll, that in February 1948 Knoll rushed to Chicago after receiving a telephone call in New York (R. 162-165), that he subsequently reported that he had difficulty in getting into his Chicago apartment and that, when he got in, Lutwak jumped through the window (R. 98-99, 101-103). Thereafter, Maria

In June 1948, Haberman saw Maria with Knoll at the Maypole Street apartment, including an early morning sight of them in bed together (R. 176-179). Maria was always known as Munio Knoll's wife to Haberman, and never as Mrs. Lutwak (R. 181). In September, 1948, after an altercation with Munio Knoll on another matter, in which Haberman accused Knoll of illegal entry into the United States, Knoll asked him not to speak about his illegal entry and that of the others to anybody (R. 174-175).[9]

Subsequent to the foregoing testimony, the United States Attorney read into the record the sworn testimony of Munio Knoll before immigration officers given on November 24, 1948, and January 4, 1949. The statements were received in evidence only against Munio Knoll (R. 185, 282, 332-333; Govt. Exs. 13 and 14), and disclosed the following:

Knoll had first testified in the immigration service investigation that he had obtained a court divorce from Maria in Budapest in 1942 on the ground that he and Maria were second cousins (Govt. Ex. 13, p. 5). He later testified that the divorce was a "Jewish divorce," not a court di-

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went to New York (R. 102). In April and again in May 1948, Haberman saw Maria and Munio Knoll at a New York hotel and when he urged Knoll to become reconciled with Maria, Knoll replied that it was not so simple after having come back suddenly from New York and "found her with another man" (R. 165, 169). In the second conversation Knoll thought he might get together again with Maria (R. 169).

[9] This conversation was admitted only against Munio Knoll (R. 175).

vorce (Govt. Ex. 13, p. 11; Govt. Ex. 14, p. 4). Still later, he testified that the reasons given had been sexual incompatibility, the separation of Maria from him, the absence of any children, and the concealment of identity from the Nazis (Govt. Ex. 14, p. 3). He could not produce the divorce decree (Govt. Ex. 13, p. 11) but testified that he had exhibited it to the Paris officials at the time of his ostensible marriage to Bess Osborne in 1947 (p. 7).[10] After the rabbinical divorce he and Maria went to different towns in Hungary (Govt. Ex. 13, p. 13). They were apparently together in Roumania, Maria allegedly being employed by him there (Govt. Ex. 14, p. 6). She preceded him to Paris in 1947 by three months and lived "on her own money" there, including money which Knoll paid her by reason of his employment of her in Roumania (*Id.*, pp. 5, 6). Knoll reached Paris in June 1947. He denied that he held out Maria as his wife or lived with her. He denied that he knew of any ulterior purpose in her marriage to Lutwak, although he had stated to her "that she should marry [Lutwak] as it was the only way she could gain entry into the United States" (*Id.*, pp. 5-6). He denied any payments or promises to Lutwak (*Id.*, pp. 7, 25-26). He further denied that there was any discussion looking toward his

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[10] He explained the fact that his prior divorce did not appear in the 1947 marriage certificate, although that of Osborne was stated (see Dfts. Ex. A), on the basis that he had not thought it necessary to direct the attention of the Paris authorities to the divorce, since he had assumed they would note it from the decree he had left in the papers deposited by him (Govt. Ex. 13, p. 13).

following Maria to the United States. He testified that although the United States relatives wanted him to "reunite" with Maria, he wrote to them that he neither wanted to go to the United States nor rejoin Maria (*Id.*, p. 6).

With respect to the period of approximately a week from the time of Osborne's arrival in Paris to the date of his ostensible marriage with her,[11] Knoll testified, "I was living in a hotel where all the Americans congregated and she was living in that hotel and I got to know her. I showed her Paris. * * * [N]obody introduced me" (Govt. Ex. 13, p. 7). He asserted that the marriage was "consummated" in Paris but that he had never had sexual intercourse with Osborne, and had spent only part of one night in Paris with her (Govt. Ex. 14, p. 13), and that they separated upon arrival in the United States (*Id.*, p. 24).

Knoll further testified in the immigration service investigation that, about three days after his arrival in Chicago, Lutwak asked Knoll to meet him and Osborne at the Admiral restaurant, since Osborne needed money. Knoll went to the restaurant, desiring to be present at any payment of money, because he had heard that a portion of an aggregate sum of $10,000 he had sent to a sister in New York, had been diverted to Lutwak. He saw Lutwak deliver a check to Osborne but testified that he knew nothing of its amount or the source of the money (Govt. Ex. 14, pp. 7-8, 10, 14-15).

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[11] Osborne left Chicago for Paris by plane on October 25, 1947 (Govt. Ex. 8). The marriage ceremony took place on November 3, 1947 (Dft. Ex. A).

He testified that he had moved to the Maypole Street apartment in Chicago on December 24, 1947, and that Maria left when he moved in, but returned for a few days and did not live there "the whole time." He asserted that the living together with Maria was never as man and wife. (Govt. Ex. 13, pp. 11-12, Govt. Ex. 14, pp. 25-26.)

After the reading into evidence of Munio Knoll's statements, Osborne, over objection of defense attorneys, was permitted to testify. The trial judge ruled that in the case of "people going through something that is a mockery, which they did not intend to be a marriage", foreign law would not be presumed to grant the status of spouse, for purposes of the privilege against a spouse's unfavorable testimony (R. 187, 189). Osborne testified, *inter alia,* as follows:

She was introduced to Lutwak early in September 1947 by Zapler. Lutwak told her he had an uncle Leopold Knoll in Europe whom he wanted to bring to the United States, that he wanted a woman who had been in the service to marry the uncle for the purpose and would pay her $1,000, and that after six months the ostensible spouse could have a divorce. About a week later, Osborne met Treitler at the latter's home with Lutwak and Maria present. Treitler urged the sympathetic aspects of the project upon Osborne (R. 192-195, 202).

About the end of September, Lutwak and Osborne had further talks, arranging the details of

her trip and the payment of $500 for expenses and $100 for clothes. Lutwak asked Osborne to marry Munio instead of Leopold Knoll, so that Munio could be reunited with his former wife Maria. Lutwak accompanied Osborne when she applied for her passport. (R. 195-198, 219-220) Osborne met Treitler again at the Chicago airport on October 25, 1947, when the two left for Paris. Osborne did not pay for her own ticket. Lutwak and Maria were also present. At Paris, the next day, Osborne and Treitler were met by Munio Knoll and a relative of the Knolls, Wircberg. Treitler introduced Osborne to Knoll. They stayed at le Khedive hotel, where Knoll also stayed. During the week following their introduction, Osborne and Knoll went to a lawyer's office where all arrangements for the marriage ceremony were made. The ceremony took place on November 3, 1947, at the Paris City Hall, in the presence of Leopold Knoll and Wircberg. No wedding ring was given Osborne either then or thereafter. (R. 191-192, 197-199.)

After the ceremony, Osborne lived by herself at le Khedive and later at another hotel. During this time Treitler told her, several times, that she would receive $1,000 (R. 200-201). On November 12, 1947, Munio Knoll and Osborne left Paris, arriving in New York on November 13, where Knoll applied for admission as a nonquota immigrant (R. 202-204). In the application for admission, after the heading "Name and address of person

to whom destined in United States" Knoll's destination was stated as "Wife Bessie Benjamin Osborne Romankiewicz,[12] 35 S. Central Park Ave., Chicago, Illinois."[13] The application was filled out in part by an immigration officer who talked with Osborne and with Knoll, to the latter in German. After the discussion, Knoll was asked to sign the application. Osborne and Knoll arrived in Chicago that night. Lutwak and Maria were among the group at the airport. Lutwak and Osborne went by cab to a hotel, Lutwak again informing Osborne that she would get $1,000. Knoll went elsewhere with the others. About three days later, Osborne, Lutwak, and Munio Knoll met at the Admiral restaurant, where Lutwak gave Osborne a $1,000 check signed by Lutwak. (R. 203-207, 211-213; Govt. Ex. No. 2.)

About six months later, Osborne discussed a divorce with Knoll, and Knoll asked her to wait two years "because he wanted to become an American citizen." On May 3, 1950, Osborne filed her petition for divorce.[14] In November 1950, Knoll asked

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[12] This last name was one used by Knoll during 1941 and subsequently (Govt. Ex. 13, p. 11).

[13] This was Treitler's address (R. 65). Osborne apparently never lived there, nor did she stay elsewhere with Knoll (R. 210, 213).

[14] The petition included an allegation that Osborne had "lived and cohabited" with Knoll until his desertion of her on November 15, 1947 (Dft. Ex. B). Osborne testified that she had not read the text of her petition and would not have signed had she noted the statement (R. 214, 221-222). On October 17, 1951, following the trial of this case, her divorce was granted. *Romankiewicz v. Romankiewicz*, No. 50S6904, Super. Ct., Cook County, Ill.

her to wait until after the conspiracy trial[15] (R. 209).

At no time did Munio Knoll ask that the ostensible marriage be "meant" or be followed by living together (R. 215). At no time subsequent to the ceremony did Osborne use the ostensible married name and, according to the understanding, she was not to use the name. The marriage was never "consummated." Munio Knoll never contributed to Osborne's support and Osborne never lived with him. (R. 209-210, 213-220.)

Grace Klemtner was then called as a witness of the court, upon the Government's expression of unwillingness to vouch for her, and over objection that she was the wife of Leopold Knoll (R. 224-226).[16] She testified to substantially the same chronology of events already in evidence; *i.e.*, her departure for Paris on November 1, 1947 (R. 228); the form of a marriage ceremony on November 6 (R. 245); Leopold Knoll's entry into the United

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[15] This conversation was admitted only against Munio Knoll (R. 209).

[16] One Jane Turner had previously testified that she saw Grace Klemtner off to Europe at the Chicago airport in December 1947 and met her upon her return at the New York airport as the ostensible Mrs. Leopold Knoll (R. 132-134). Present upon Klemtner's return with Leopold were Munio Knoll and Lutwak (R. 134). Klemtner told Turner that Leopold was ill (R. 137). The two women went from the airport to a New York hotel, where they stayed for three days. Thereafter they went to Los Angeles, where they resided together in various apartments until the time of the trial. At no time did Leopold Knoll reside with Klemtner and Turner. In Los Angeles, Grace used the last name "Klemtner," but received mail under the name "Knoll" as well as "Klemtner." She received letters and money from Leopold Knoll from time to time (R. 134-138).

States with her on December 5 (R. 251); her residing with Turner at all times thereafter in New York, Chicago, and Los Angeles up to the time of the trial (R. 254-256). Klemtner further testified that she had known Treitler for many years and saw her three or four times a year at meetings of a women's organization to which both belonged. She had seen Treitler a few weeks before November 1, 1947, and Treitler arranged a hotel reservation in Paris for her, but made no suggestions concerning Klemtner and the brothers in Paris and never paid her any money (R. 228-30, 232). Klemtner first met Lutwak in 1946.[17] She testified that he had nothing to do with her trip, never paid her any money, never informed her of his own trip and marriage. He was present when Klemtner applied for a passport, and he took her and Turner to the airport (R. 232-234, 237-238, 247). In a later portion of her testimony, she refused to answer the question whether she had talked to Treitler or Lutwak about Leopold Knoll before leaving Chicago, asserting the privilege against self-incrimination (R. 247). She also refused to testify, on the grounds of self-incrimination, as to the source of the money for her round-trip plane fare (R. 242).

In conclusion, sworn statements to the immigration authorities by petitioners Treitler and Lutwak and by Leopold Knoll were read into evidence

[17] Klemtner offered no explanation of the statement in Lutwak's affidavit on Klemtner's passport application that he had known her for four years (R. 238-239).

and admitted, in each case, only against the defendants who had made them (R. 273-275, 282, 332-333, Govt. Exs. 15-18).

Lutwak refused to testify before the immigration authorities concerning Marid (Govt. Ex. 15, p. 4). He did testify that he had met Osborne at Treitler's home, that the whole family had asked him to speak to Osborne about marrying his uncle, and that there was a general "understanding" that Osborne would marry Munio "if they liked each other" (*id.*, pp. 5-6, 10-13).

With respect to the payment to Osborne of $1,000 in November 1947 at the Admiral restaurant, Lutwak "vaguely" recalled that Munio Knoll had called for the meeting and directed this application of money held for him by Lutwak. He did not recall whether the money was payment for the ostensible marriage. Lutwak stated that he himself had never paid or been paid or promised anything in connection with the ostensible marriages (*id.*, pp. 15-17).

Treitler testified before the immigration authorities that she knew Munio was unhappy because of his divorced status and she spoke with Osborne about him in the hope of making him happy (Govt. Ex. 16, p. 4; Govt. Ex. 17, p. 3). She stated that she could not recall whether Osborne was her guest on the Paris trip, and did not remember an agreement to pay $1,000 to Osborne (Govt. Ex. 16, p. 4; see also Govt. Ex. 17, pp. 3-4). In reply to questions whether there had been an earlier suggestion that Osborne would marry Leo-

pold rather than Munio Knoll, whether other sisters assisted financially in bringing the relatives to the United States, and whether she had ever talked with Grace Klemtner about a trip to Paris to meet the brothers, her response was that she could not remember (pp. 4-6).

The judge's instructions to the jury included the following:

> Certain statements, allegedly made by the defendants in this case, have been received in evidence and read to you, in whole or in part. You are instructed that these statements are not to be considered by you as evidence against any defendant other than the defendant who made the statement [R. 332-333].
>
> * * *
>
> During the trial, evidence has been admitted only as to certain defendants. You may consider that evidence, so limited, only as to those defendants, and not as to other defendants.
>
> * * * The declarations, statements and conversations of one or more defendants, made out of the presence of the other defendants, is not binding upon any other defendant, unless the evidence—not including any of such declarations, statements or conversations other than his own—shows, beyond a reasonable doubt, that such other defendant was a participant in the conspiracy charged in the First Count of the indictment at the time of such declarations, statements or conversations, and unless, further, the declarations, state-

ments and conversations were in furtherance of the conspiracy and made during its continuance. * * * [R. 337-338].

* * *

* * * In considering whether or not a particular defendant was a member of the conspiracy, you must do so without regard to and independently of the statements and declarations of others. In other words, you must determine the membership of the particular defendant from the evidence concerning his own actions, his own conduct, his own declarations, or his own statements, and his own connection with the actions and conduct of others. [R. 341].

* * *

The mere knowledge, acquiescence, or approval of an act, without cooperation or agreement to cooperate, is not enough to constitute one a party to a conspiracy. * * * [R. 342].

* * *

* * * It is a question of fact based upon the evidence in this case for the jury to determine whether or not at the time the aliens entered into the United States under the provisions of the United States Code they were in fact entering as man and wife and to thereafter reside in the United States as man and wife. [R. 338].

* * *

The marriage of a man and woman where one of the parties thereto has a husband or

wife by a prior marriage who is then living and undivorced is void.

Mutual consent is necessary to every contract and no matter what forms of ceremonies the parties may go through indicating the contrary, they do not contract if they do not in fact assent, which may always be proved. Marriage is no exception to this rule: a marriage in jest is not a marriage at all. It is quite true that a marriage without a subsequent consummation will be valid; but if the subjects agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has served its purpose to deceive, they have never really agreed to be married at all. They must assent to enter into the relation as it is ordinarily understood, and it is not ordinarily understood as merely a pretense or cover to deceive others.

You are hereby instructed that it is for you, the jury, to determine from all of the facts in evidence what the intentions of the parties were at the time the marriage ceremonies were performed. [R. 339].

* * *

* * * It is sufficient if the parties intend immediately to be bound permanently, even though they do not intend forthwith to assume all the duties and responsibilities of marriage. Moreover, once there is this meeting of the minds and the marriage ceremony required by

law is performed, the marriage is complete and the status of the parties as married becomes fixed by law, even though they immediately repudiate the agreement and thereafter act in total disregard of their marital rights and duties.

Although the cohabitation of the parties, subsequent to the marriage, is evidence of the existence and reality of their consent, cohabitation is not necessary to the validity of the marriage. Nor is a marriage invalid merely because it has not been consummated.

If the consent of the parties is plainly expressed, a secret reservation of one of the parties will not invalidate the marriage, nor will the fact that one of the parties gave his consent to the marriage because of some ulterior motive or motives invalidate it. If the essentials of capacity and consent are present, the marriage is valid, even though one of the parties consented because he expected some material advantage as the direct consequence of his entering into the marriage. The mere fact that one of the parties to a marriage knew and expected that by reason of entering into the marriage his coming to the United States would be facilitated does not in and of itself render the marriage invalid. [R. 340].

SUMMARY OF ARGUMENT

I

A. Even accepting the erroneous assumption that the conspiracy ended with the entries of the

alien "spouses" into the United States, evidence that the parties did not thereafter live together or act married was relevant and therefore admissible. Because the substantial issue presented relates to evidence of acts, not declarations, the question as to admissibility turns on the problem of relevance, not hearsay.

The nature and purpose of the marriages, the intentions of the parties with respect to the marriages, and the truth of the representations that they were husbands and wives who intended to live together were clearly material issues on any theory of the conspiracy's duration. Because it was obviously relevant to these issues, the evidence that the parties lived apart and acted unmarried after entering the United States was admissible against all conspirators. Similarly, the fact that early arrangements were made for severing the formal marriages by divorce was relevant and admissible against all. *United States* v. *Rubenstein,* 151 F. 2d 915 (C. A. 2), certiorari denied, 326 U. S. 766.

It is not the law that evidence of the acts of one party is admissible against another only where the former is an agent or co-conspirator of the latter. For example, if it is material in a lawsuit against *A* that *B* and *C* were once married, evidence that *B* and *C* lived together and acted married is admissible against *A* because it is obviously relevant under settled principles of the law of evidence. These principles apply here. They refute the contention that the evidence petitioners attack as postdating the conspiracy was improperly admitted.

B. In any event, the conspiracy did not end with the entries into the United States. It was clearly part of the scheme that the purported husbands and wives would live apart and be divorced, so that evidence of these facts was admissible against all the conspirators.

From its inception, it was clear that successful fulfillment of the conspiracy required the separations and divorces of the ostensible spouses. Like the division of spoils among thieves or the collection of insurance proceeds after a murder for profit, these steps in carrying the scheme to completion were essential parts of the conspiracy. Accordingly, evidence proving these steps—whether acts or declarations—was properly admitted against all the conspirators.

II

While there are powerful arguments for abolishing the privilege against a spouse's unfavorable testimony—just as the rule forbidding husbands and wives to testify for each other has been abolished—there is no occasion here to reach this broad problem. Accepting the privilege as still available in a proper case, the trial judge's ruling against it, following overwhelming testimony that the marriages were sham forms, was clearly justified.

The basis for the privilege has been the belief that marital trust and harmony would be threatened, and basic notions of fairness offended, by permitting one spouse to testify against the other. These considerations have no place where the forms

of marriage have been employed only for deception —where the purported spouses have never lived or intended to live with each other and where the "marriage," as soon as its deceptive purpose was accomplished, was intended by the parties to be dissolved by divorce. In every sense of the word which has any relevance to the privilege asserted, the "marriages" in this case were not "marriages" at all. *Cf. United States* v. *Rubenstein, supra,* at 918-919. Nor is it necessary, in determining whether this American privilege claimed in an American court was properly denied, to inquire as to the consequences under French law of the empty forms the parties created. What is decisive is that the evidence thoroughly proved the absence of any factual basis for the privilege.

If the common law could be interpreted to extend the privilege, incongruously, to situations like the one presented here, we submit that there is no basis in "reason and experience" (Rule 26, F. R. Crim. P.) for application of any such interpretation in the federal courts. Beyond this, there is no suggestion of a need in this case to determine whether the privilege should be altogether discarded.

III

A. If the claim of privilege was properly denied, there was no reason to hold the alleged spouse incompetent to testify to facts proving the character and purpose of the alleged marriage—facts which happened to be material in the case as well as determinative of the issue of competency. The question

of competency was for the judge and had to be resolved by him before the witness could be heard by the jury at all. Once such a claim of privilege has been rejected by the court, the witness is competent to give testimony on all manner of damaging issues, and the weight of such testimony is neither lessened nor enhanced by the prior dispute, in which the jury plays no part, as to competency. There is no basis in reason—and petitioners make no attempt to suggest one—for the asserted rule that such a witness may not testify on issues which, in addition to being material in the action, were earlier required to be resolved by the judge before the witness could testify.

B. While the decision in *Miles* v. *United States*, 103 U. S. 304, appears on its face to support petitioners' contrary view, it is distinguishable. In the first place, the opinion in *Miles* strongly suggests that the trial judge there failed to make the necessary determination of competency, through witnesses other than the alleged spouse, before permitting her to testify. Accordingly, this Court said that when this witness was permitted to give testimony tending to prove the defendant's prior marriage—which was not only the issue bearing on her competency but also the sole contested issue determinative of whether the defendant was guilty of the charge of bigamy—her evidence was serving both to prove defendant's guilt "and at the same time to establish the competency of the witness." 103 U. S. at 315. Obviously, however, if her competency had not already been established, the wit-

ness should not have been permitted to testify at all. There is no comparable problem in the present case where competency was fully established by other witnesses before the witnesses whose testimony is complained of were called.

Another possible distinction of *Miles* is that the law applicable there permitted the testimony of spouses either for or against each other. It followed that, in a prosecution for bigamy, an alleged second wife could not logically have given testimony to disprove the alleged first marriage, for this would at the same time tend to prove the legality of her marriage and, therefore, her incompetency to give the testimony. Judging from the authorities cited in *Miles*, this logical difficulty led to the rule prohibiting any testimony by an alleged second wife either to prove or disprove the contested assertion of a valid prior marriage. Since the disqualification of spouses to testify *for* each other has been abolished (*Funk* v. *United States*, 290 U. S. 371), the former dilemma which may have led to the rule of the *Miles* case no longer serves as a possible justification for the rule.

We submit, in any event, that the result for which petitioners invoke the *Miles* decision should not be applied here. Apart from the differences in fact and legal context, the *Miles* decision, on the limited issue touching this case, appears to have been forgotten in the intervening years, at least as far as the federal courts are concerned. We submit that if *Miles* is to be read as announcing the rule petitioners assert—a rule which, today, at any rate,

appears to be without reason—that decision should be, in this narrow respect, limited to its peculiar facts.

IV

The Government was not required to prove that the marriages in question were "invalid" under French law. The forms of marriage were used as forms only, solely to represent the aliens as "spouses" under the War Brides Act. The legal consequences of such forms were not only unsought and undesired by the parties, but were intended to be avoided, as soon as their deceptive purpose had been served, by prompt divorces. Accordingly, whether the forms were French or American is unimportant; they were frauds in either event. *United States* v. *Rubenstein, supra.*

Extended discussion is unnecessary to show that the "spouses" for whom Congress relaxed immigration restrictions in the War Brides Act were not such "spouses" as these. Moved by the "strong equities [which] run in favor of * * * service men and women in the right of having their families with them" (H. Rep. 1320, 79th Cong., 1st Sess., p. 2; S. Rep. 860, 79th Cong., 1st Sess., p. 2) and by the "dominant regard which American society places upon the family" (*Knauff* v. *Shaughnessy*, 338 U. S. 537, 549, dissenting opinion of Mr. Justice Frankfurter), Congress lowered the ordinary bars to immigration so that alien spouses could come to live and raise families with the soldiers they had married.

Conspiring to misrepresent the aliens in this

case as such spouses and to state falsely that these aliens were entering to live with the ex-soldiers they had married, petitioners committed the offense of which they were convicted regardless of what the French law of marriage may be. It may be, for example, that these marriages were "valid" under French law, as they were under American law, in the sense that a court of equity, knowing the facts, would not aid the conspirators to complete their fraudulent scheme with divorces or annulments. But this kind of "validity," the effect of which petitioners avoided by seeking divorces on the ground of "desertion" without disclosing the fraud in which the "marriages" were conceived, scarcely aids petitioners. Indeed, it only serves to point up the fraudulent character of the purported marriages. That a marriage ceremony is designed to have consequences which the parties here intended to avoid cannot alter the material facts of conspiracy to misrepresent and conceal upon which petitioners were convicted. The result is the same where the legal forms employed for the deception are French as it is where they are American.

V

It was undisputed that Munio Knoll and Maria had been married in 1932. Munio first told the immigration authorities that this marriage had ended in a civil divorce; later he claimed a rabbinical divorce; but he never produced the document, which he claimed to have, showing a divorce of some kind. Munio's certificate of mar-

riage to Bess Osborne in 1947 showed that she had had a prior marriage and divorce, but made no similar statement as to him. In addition to these facts, the Government proved that Munio and Maria, not Munio and Bess, lived together and represented themselves as husband and wife after entering the United States.

This evidence fully justified the instruction that a bigamous marriage is void. And petitioners err in contending that the court should also have charged that the earlier marriage was presumed to have ended in a valid divorce. In criminal prosecutions for bigamy, it is sufficient if the prosecution shows a valid marriage and a later marriage or act of adultery while the spouse in the (first) marriage is alive. There is no presumption of divorce in such cases and the prosecution is under no burden to prove the sweeping negative fact that there has been no divorce. If there has been a divorce, the defendant is peculiarly able to prove it, and the burden is upon him to do so.

This rule is plainly applicable to the prosecution in this case. The presumption petitioners invoke of the validity of a second marriage may apply in civil cases where a marriage is collaterally attacked, ordinarily where the party who could defend against the attack upon the marriage is not before the court. Even this type of presumption may well disappear in a case where evidence such as the Government produced here has been presented. Aside from this, however, the analogy

from civil cases upon which petitioners rely is clearly inapposite.

ARGUMENT

I

Evidence That the Spouses in Each Purported Marriage Lived Apart from Each Other and Proceeded to Sever Their Formal Ties by Divorces After the Entries into the United States Was Properly Admitted against All the Conspirators

Summarized briefly, but sufficiently for present purposes, major elements of the Government's case against the petitioners were misrepresentations to immigration officials (1) that the purported "war brides" intended to live with their purported spouses, and (2) that the immigrant spouses had been "married" in the ordinary sense, and had not merely participated in marriage ceremonies for the sole and exclusive purpose of securing entry into the United States. To prove that the parties to each marriage did not actually intend to live together, the Government adduced evidence that they separated promptly upon arrival in the United States and continued to live apart thereafter. To prove that the purported marriages were shams, the Government proved that the spouses, living apart, never acted married; that divorce proceedings, contemplated from the outset, were begun with the dispatch appropriate to the conspirators' purposes; and that petitioner Munio Knoll and Maria Lutwak (Knoll), members of two of the ostensible marriages, acted after arrival here as if they were married to each other, as they had at least once been.

Without questioning the materiality of the misrepresentations this proof was designed to establish, petitioners contend (Br. 25-31) that the proof was inadmissible under this Court's decision in *Krulewitch* v. *United States*, 336 U. S. 440. First (in order of logic), petitioners apparently assume (Br. 29-31) that the evidence in question could have been deemed admissible only on the theory which permits acts and declarations of one conspirator, occurring during the course and in furtherance of a conspiracy, to bind a co-conspirator and serve as evidence against him. Second, they urge (Br. 25-29) that the conspiracy ended with the entries into the United States and that the theory of admissibility which they assume to be the only possible one was therefore unavailable.

It bears mention at the outset that, if petitioners' arguments were correct, proof of facts such as those which were in issue in this case would be difficult to the point of impossibility, for the most obvious evidence that the parties did not intend when they entered to live together as husbands and wives is evidence that they promptly proceeded not to live together. Passing this practical consideration, however, the decisive point is that petitioners have erred in both branches of their argument.

A. *The evidence of which petitioners complain was admissible against all of them regardless of when the conspiracy ended*

As petitioners point out (Br. 26), the testimony they attack on the ground considered here "consisted largely of evidence to the effect that the

parties to each marriage lived apart from each other * * *; that the husband in one marriage lived and slept with the wife (his former wife) in another marriage * * *, and took her to night clubs where they had pictures taken of themselves and others * * *." This evidence, it is important to note, is evidence of *acts*, not of *admissions*. In their argument, petitioners refer (Br. 29) to a single admission by one conspirator which they assert was admitted against all, but this assertion is mistaken.[18] It is clear, we think—from petitioners' argument here and in the court below, and on consideration of the record, including particularly the nature of petitioners' objections in the trial court, which we discuss more fully in the margin[19]—that the substantial issue presented

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[18] The admission in question is that of petitioner Munio Knoll, testified to by witness Haberman (R. 160), that it is "easy * * * to come to the United States if you know how." Referring to a general statement of the trial judge on the preceding page (R. 159), during a colloquy with counsel while the jury was outside the courtroom, petitioners state that Munio Knoll's statement was admitted against all of the petitioners. But the record shows the contrary. Shortly before, during witness Haberman's testimony (R. 152), the trial judge had said the conversation to which the witness was about to testify was to be admissible only against Munio Knoll and Lutwak, who were present at it. While a similar ruling does not appear on the page to which petitioners refer, the trial judge expressly called the attention of the jury shortly afterward to the very conversation and statement in question and told them it was admissible only against Munio Knoll (R. 174), after reminding counsel a few minutes earlier that this ruling applied to all the conversations to which Haberman testified (R. 167). Later in the trial, the trial judge reminded the jury of this limitation on Haberman's testimony (R. 288).

[19] Petitioners made a blanket objection to evidence of facts —acts or declarations—following the entries into the United States, an objection which was renewed from time to time dur-

concerns acts, not admissions, which are claimed to have been improperly admitted against co-conspirators.

The evidence of acts, which petitioners claim was improperly admitted, was evidence showing that the respective "husbands" and "wives" in the purported marriages never lived together, never acted married, and (except in the case of Leopold Knoll, who was acquitted) carried out the plan to

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ing the trial (R. 66; and see R. 67, 135, 142, 204). Though this objection was overruled as to evidence of acts, the trial judge repeatedly ruled that evidence of statements by one conspirator would be admitted only against that conspirator (*e.g.*, R. 152, 167, 174, 175, 209, 278). In one instance, however, testimony that Munio Knoll had asked Bess Osborne to postpone her divorce action until he had become a citizen was admitted against all the petitioners (R. 208-209). But, although defendant Leopold Knoll (who was acquitted) objected in advance, as to himself, to evidence of this conversation, none of the present petitioners made any such objection. It seems clear, in any event, that in view of the great cumulation of uncontroverted evidence showing that Munio Knoll's marriage to Bess Osborne was designed solely to secure Munio's entry into the United States, this single bit of testimony that Munio asked Bess to delay her divorce until he became a citizen can scarcely be viewed as particularly hurtful, assuming for the present (but see pp. 42-47, *infra*) that it was erroneously admitted. We think the nature of this single bit of testimony, the absence of specific objection to it, and petitioners' argument here demonstrate that this alone could constitute no basis for reversal on any theory. But if we are wrong in this conclusion, the following alternatives should be outlined:

(1) If we are correct in arguing (pp. 42-47, *infra*) that the conspiracy was not ended, the piece of testimony in question was admissible on that ground.

(2) If the Court were to (a) accept the argument we are here introducing, making the evidence of *acts* admissible regardless of when the conspiracy terminated, (b) reject our later argument that the conspiracy continued, and (c) hold that admission of Munio Knoll's statement against the two other petitioners was reversible error, this would be no ground for reversal as to Munio Knoll, whose admission was concededly admissible against himself.

be divorced after entering the United States. This evidence was obviously relevant to prove that the marriages had been contracted only so that the aliens could enter as "spouses" under the War Brides Act and to prove that the purported spouses lied when they represented to the immigration authorities that they intended to live with the ex-serviceman and ex-servicewomen they had ostensibly married. Because this evidence was relevant, it was admissible regardless of when the conspiracy terminated. For there is no problem of hearsay here, as there was in *Krulewitch,* and the acts of one party may be admissible in evidence against another party when they are relevant on a material issue against the latter, without any showing that the parties are related as conspirators (or related in any other way) at all.

Where it is sought to introduce against Conspirator *B* evidence of *declarations* by Conspirator *A*, the obstacle is that, as to *B,* these declarations are hearsay, as this Court's *Krulewitch* decision makes clear.[19a] In such a case, the theory of "criminal agency"[20] which makes co-conspirators responsible for the acts and declarations of each other is necessary to overcome the hearsay objection. And so when the declaration of Conspirator *A* is not made during the course of the conspiracy, the vice

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[19a] Of course, the declarations are, in the strict sense, hearsay as against *A* as well, but are admitted on the elementary ground that a party's own admissions may be adduced against him.

[20] See 2 Wharton, *Criminal Evidence* (11th ed.), pp. 1185-1186.

of hearsay is present and evidence of such a declaration is inadmissible against *B*.

Where the evidence in question relates to an *act* of Conspirator *A*, however, the problem is simply one of relevance, not of hearsay. The vital importance of this point here is that, if evidence of some act or condition or characteristic of *A* is *relevant* to prove guilt or any material fact against *B*—regardless of whether *A* is a co-conspirator or simply a third party unrelated by agency to *B*—there is no need to invoke the conspiracy theory of criminal agency in order to introduce such evidence against *B*. Identifying the distinction to which we refer, Professor Edmund Morgan has pointed out the necessity for differentiating—

> between * * * declarations offered for their assertive value and * * * non-verbal acts and declarations *offered as constitutive conduct for which the conspirator or principal is alleged to be responsible.* In the latter situations, the question is one of relevancy only * * *. [Emphasis added.] [21]

The present case presents such a situation, where the question is one of "relevancy only," and the answer to this question makes it unnecessary to consider petitioners' argument (clearly fallacious in our view, pp. 42-47, *infra*) that the conspiracy ended with the entries into the United States. For the evidence of which they complain was (with a

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[21] Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*; 43 Harv. L. Rev. 165, 183 (1929).

trivial exception, the unimportance of which is emphasized by petitioners' failure to rely upon it; see note 19, *supra*) evidence of the *acts* which was *relevant* to material issues as to the guilt of all the conspirators.[22] It was alleged—and petitioners make no pretense of denying the materiality of the allegation—that the conspirators arranged "marriages in form only," solely to accomplish "war bride" entries into the United States, not intending that the spouses should live or deal with each other as husband and wife, and intending that the formal marriage ties would be severed at the convenience of the parties (R. 6-7). To prove the character of these marriages, for which all of the conspirators were admittedly (at least for purposes of the present *Krulewitch* problem) responsible, it was obviously relevant to show that the respective purported "husbands" and "wives" never lived together, never acted married to each other, and took early steps to procure divorces. Indeed, whenever the existence of a marriage is in issue in a lawsuit, it is universally recognized that evidence of the conduct of those alleged to be married is relevant and admissible.[23] So, for example, where a material fact in a lawsuit damaging to Party *A*

[22] Following the widespread, but not necessarily uniform, usage adopted in the American Law Institute's *Model Code of Evidence*, Rule 1(8) and (12), we use "relevant" here to describe "evidence having any tendency in reason to prove any material matter," while "material" refers to "a matter the existence or non-existence of which is provable in the action."

[23] 2 Wigmore, *Evidence* (3d ed.), § 268:

> When the fact of marriage is in issue—whether a consensual or a ceremonial marriage—the subsequent *con-*

would be the fact that *B* and *C* were married (say, in a suit by *B* against *A* for loss of *C's* services, where *A* denied that *B* and *C* were married), evidence that *B* and *C* lived together and behaved as husband and wife would be admissible against *A*. This, obviously, would not result from any notion that *B* and *C* were co-conspirators of *A*, but simply from the circumstance that the evidence of *B's* and *C's* acts was relevant on a material issue against *A*. Similarly, here, there is no need to hold that petitioners Lutwak and Treitler were responsible as "principals" for the conduct of Munio Knoll and Bess Osborne, ostensibly married, in living apart, vigorously acting unmarried, etc. What matters is that the nature of Knoll's marriage to Osborne and the truth of their representation to immigration officials that they planned to reside together after entering the United States were both material issues in the case against all the conspirators, and the evidence of their subsequent conduct was plainly relevant and admissible on these issues regardless of Knoll's and Osborne's roles as co-conspirators.

Squarely in point here is the decision of the Court of Appeals for the Second Circuit in *United States* v. *Rubenstein*, 151 F. 2d 915, certiorari denied, 326 U. S. 766. There, as here, the defendant was charged with conspiring "to bring into the country an alien by false representations [and]

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duct of the man and the woman said to have been the parties to it is receivable to evidence the marriage. * * * * * * That this sort of evidence is admissible seems never to have been questioned.

by concealment of material facts." There, as here, the device used was a marriage ceremony between the alien and an American citizen in order to effect admission of the alien as the citizen's spouse. There, too, the marriage was never consummated, the parties lived apart, and a divorce was arranged at an early date after the entry. The defendant complained in that case that evidence of the divorce (which had, incidentally, been procured by fraud; cf. note 41, p. 73, *infra*) was inadmissible, because "it was an independent and disconnected crime, the conspiracy having ended when Spitz entered under the immigration visa." Rejecting this contention, Judge Learned Hand wrote (with the concurrence of Judges Augustus Hand and Frank on this point, 151 F. 2d at 917-918):

> * * * [The defendant] is right in saying that the crime ended with the entry; but it by no means follows that evidence of the divorce was not relevant to the crime. Before she obtained the fraudulent visa Spitz [the alien "spouse"] had told Rubenstein [the defendant, a lawyer] that there was to be a divorce; Sandler [the citizen "spouse"] had said the same thing; and Rubenstein had assured him that there would be a divorce almost at once. If the spouses' intent at the time of the ceremony was probative of fraud upon the immigration officials (as we shall show that it was) [see pp. 53-54, 68-69, *infra*] it was relevant to prove that they were later divorced, because it went to confirm their testimony as to what they had originally intended and agreed upon. We are therefore all agreed that *the*

fact of the divorce was relevant; indeed this becomes at once apparent if we consider how damaging to the prosecution's case it would have been, if no divorce had followed. [Emphasis added.]

The applicability of Judge Hand's reasoning and conclusion to the instant case is plain.[24] It was material to the guilt of the petitioners that the marriages and statements to the immigration officials were accomplished with the fraudulent intent we have described. Because it was relevant, and not hearsay, evidence of this intent, proof of the non-marital conduct and living apart of the spouses was properly admitted.

The faulty premise underlying petitioners' contrary view is the idea that acts of *A* may be evidence against *B* only where *A* and *B* are co-con-

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[24] One defendant in the instant case, Leopold Knöll, who was acquitted, gave eloquent testimony, through the conduct of his defense, to the commonsense judgment of obvious relevance which makes the evidence under attack admissible. At the trial, counsel for Leopold Knoll was at some pains to show that the marriage of this defendant was real, that it had been consummated, that Leopold had lived (beginning only on a date over two years after his entry into the United States) with the woman he married. Leopold's counsel went even further and elicited from Leopold's spouse an assurance that she intended to live with him as his wife in the future, after this trial (R. 260-261.) While there was additional evidence differentiating Leopold from the other defendants, it is clear that the evidence just cited was favorable to him and probably accounts in some measure for his acquittal. It is clear, moreover, that evidence of his spouse's acts subsequent to his entry into the United States was admissible in his favor simply because it was relevant, and not because of any theory that she performed these acts as his agent. As we show in the text, the same basis for admissibility applies to the similar unfavorable evidence of which the petitioners complain.

spirators and the conspiracy is in progress.[25] As we have shown, the fallacy here is the failure to recognize that, where *acts* are in question, the problem is solely one of relevance, and that it is only where the act of *A* would otherwise be irrelevant as to *B* that it is necessary to resort to the conspiracy (agency) theory to admit evidence of such an act against *B*.[26] Because the evidence petitioners attack was relevant against all of them, the attack must fail.

B. *In any event, the conspiracy did not end with the entries into the United States; it was clearly "within the scope of the unlawful project" that the purported spouses would live apart and be divorced, so that evidence of these facts was properly admitted against all the conspirators*

When a conspiracy begins or ends is, of course, a factual question in each particular case. Dealing cursorily with the facts of the present case (Br. 25-26), petitioners urge that their conspiracy ended with the last entry into the United States, on December 5, 1947, because by that time "all

[25] Compare Underhill, *Criminal Evidence* (4th ed.), p. 1414; "Acts and declarations done or made by conspirator before formation of conspiracy are not admissible against co-conspirator *unless admissible in the absence of such conspiracy.*" [Emphasis added.] See *Feigenbutz* v. *United States*, 65 F. 2d 122, 124 (C. A. 8); *cf. Sneed* v. *United States*, 208 Fed. 911, 915-916 (C. A. 5), certiorari denied, 265 U. S. 590.

[26] Not only the acts, but the condition or appearance of *A* may constitute relevant, admissible evidence against *B* without any suggestion of agency or conspiracy. For example, the physical characteristics of a child may serve as evidence on the question of paternity—not, obviously, on an agency theory,

misrepresentations, concealments, and false statements, if any, in furtherance of such entries had occurred." But this contention, ignoring the nature of the scheme charged and proved, mistakenly assumes that the conspiracy necessarily ended with completion of the substantive offenses. It is clear, however, that—

> the termination of the conspiracy * * * is not necessarily synchronous with the consummation of the substantive crime charged, but may extend beyond such time, resulting in the admissibility of acts and declarations of co-conspirators, in certain instances, after the commission of such crime. The determination of the question as to when a conspiracy terminates depends on the facts of the particular case. For example, a conspiracy to bring Chinese in from Mexico unlawfully does not necessarily and automatically end at the border, for in order to consummate successfully the unlawful introduction of prohibited aliens, it is also necessary to evade immigration officials, and hence such conspiracy continues for that purpose. [*Lew-Moy* v. *United States*, 237 Fed. 50 (C. A. 8).] * * * In homicide cases, where the crime is actuated by malice towards the deceased, a conspiracy to commit the homicide ends with the accomplishment of the crime. But where the homicide is incidental to an ulterior motive, as, for example, the collection of an insurance policy on the life of the deceased, statements made

but simply because these characteristics may be relevant to the issue. 1 Wigmore, *Evidence* (3d ed.) § 166. And see, on an analogous problem, *State* v. *Sprague*, 135 Me. 470, 475-476.

by a conspirator after the homicide, in pursuance of such objective, are admissible against a co-conspirator on trial.[27]

The indictment in this case charged that petitioners conspired, not only to make misrepresentations to the immigration officials to accomplish illegal entries into the United States, but also (1) to conceal their fraud, and (2) to arrange that the purported spouses would live apart and obtain divorces (R. 4-7, 9-15).[28] Without repeating at length the summary of evidence (*supra*, pp. 7-19), the record establishes, as the indictment charged, that the separate living arrangements of the ostensible spouses and the severance of their formal marriage ties were integral and essential parts of the conspiracy. From the very beginning,

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[27] 2 Wharton, *Criminal Evidence* (11th ed.), pp. 1200-1202.

[28] Since the disputed evidence relates entirely to the facts that the spouses lived apart and arranged divorces, we shall concentrate on this aspect of the conspiracy in the discussion which follows. Referring, however, to petitioners' contention (Br. 28) that the record belies the charge of concealment, it bears mention that the evidence proved that, following the entries into the United States, in transactions at which all three petitioners were present, an apartment was rented for Maria Knoll as "Mrs. Lutwak," carrying out a pretense of marriage which it was later found expedient to abandon (*supra*, p. 9). When Maria and Munio Knoll were well enough acquainted with the Wickers (one of whom testified at the trial) to be their house guests, they felt free to share a room overnight, but when Wicker was still merely a prospective landlord and Treitler, Lutwak, and Knoll were arranging for an apartment, Maria was represented, not as Munio's wife or apartment-mate, but as "Mrs. Lutwak". In September, 1948, Munio Knoll, after a quarrel with his one-time friend and prospective business associate, Haberman, still sought to exact a promise that Haberman would not speak to anyone about the circumstances of the Knolls' entries into the United States (*supra*, p. 11).

when she set about finding ex-servicewomen to marry her brothers and bring them in as war brides, petitioner Treitler made it clear that the marriages would not have to be consummated and that early divorces were part of the plan (*supra*, pp. 7, 14). Also early in the arrangement of the scheme, Bess Osborne was persuaded to marry Munio Knoll rather than Leopold Knoll, as originally planned, so that Munio could be reunited with Maria, who had entered the United States as the war bride of petitioner Lutwak. The separations and divorces were thus no less essential to the successful conclusion of the conspiracy than the fraudulent representations by means of which the entries were accomplished. It was presumably as important to Bess Osborne, for example, that she be freed of even formal legal ties to Munio Knoll, who meant nothing to her, as it was that she be paid the $1,000 which was actually paid to her as promised *after Munio Knoll's entry* into the United States as her spouse (*supra*, pp. 6-17). It was equally vital, as the conspirators had made clear from the beginning, that Munio and Maria be reunited after entering the United States—an objective at which they arrived even before Lutwak's divorce from Maria made the reunion wholly lawful or technically seemly (*supra*, pp. 9, 10, 11).

Where the spoils sought by the conspirators remain to be realized or to be divided, the conspiracy remains alive while the conspirators act to achieve these ends. See *McDonald* v. *United States*, 89 F. 2d 128, 134 (C. A. 8), certiorari

denied, 301 U. S. 697; 2 Wharton, *Criminal Evidence* (11th ed.), § 716. Similarly, here, after the entries into the United States had been made, there remained the projects of paying Bess Osborne for her services and severing the ostensible marriage ties which had served their purpose and remained only hindrances to the ultimate objective. Pressing for her freedom from the formal marriage tie (*supra*, pp. 16-17), Bess Osborne made clear beyond doubt what the whole tenor of the scheme required—that the divorces be obtained. To argue that the conspiracy ended before these essential steps were completed is to ignore the simple factual realities which the evidence established beyond possibility of doubt.

We think it clear, in short, that the separations and divorces were "part of the ramifications of the plan which could * * * be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *Pinkerton* v. *United States*, 328 U. S. 640, 648. See also *United States* v. *McGuire*, 64 F. 2d 485, 493 (C. A. 2), certiorari denied, 290 U. S. 645. Here, as in the *Pinkerton* case, the subsequent acts done were "in execution of the enterprise." 328 U. S. at 647. This is amply demonstrated by the overwhelming probability that the Government would have failed to prove the unlawful enterprise at all had there been a showing that the spouses actually lived together and acted married after entering the United States. Indeed, the one defendant who made some showing of this sort—implicitly testifying by the effort to

its essentiality—was acquitted. Cf. *United States* v. *Rubenstein, supra,* at 917-918.[29]

It follows, we submit, that petitioners' reliance upon the rule in *Krulewitch* v. *United States,* 336 U. S. 440, is misplaced. In the first place, *Krulewitch,* as petitioners point out (Br. 27-28), involved a hearsay problem which is in no substantial sense presented here, so that a determination as to when the conspiracy ended would appear in this case (as in *United States* v. *Rubenstein, supra*) to be unnecessary (*supra,* pp. 33-42). But if such a determination is required, we submit that the separations of the spouses and their divorces (the facts petitioners claim should not have been shown) were integral parts of the conspiratorial scheme and were properly proved against all the conspirators.

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[29] It must be noted that the Second Circuit's *Rubenstein* decision, upon which we have relied in other connections (*supra,* pp. 39-41; *infra,* pp. 53-4, 68-9), appears to be contrary to the argument we press here. There, on facts unquestionably similar to those involved here, the court agreed that the conspiracy ended with the entry, but concluded that evidence of subsequent facts was nevertheless admissible on grounds we have shown to be equally applicable in this case. The problem is, of course, tied in each instance to the facts of the particular case. Without exploring at length the details of the *Rubenstein* case, which might have warranted another view as to when the conspiracy ended (a view which the court was not, after all, required to accept or reject finally since the evidence complained of was approved on another ground), we submit that the present record, as shown in the text, fully sustains the holding that the conspiracy cannot be regarded as having ended with the entries into the United States.

II

Upon a Finding That the Alleged Marriages Were "Mockeries"—A Finding Fully Sustained by the Record—The Trial Court Properly Rejected the Claim of Privilege against a Spouse's Unfavorable Testimony

In the most abstract and universal of terms (Br. 31-41) petitioners argue in defense of "the rule that in federal criminal cases one spouse cannot testify against the other unless the defendant spouse waives the privilege" (Br. 31).[30] Incongruously, on the facts of this case, they invoke "the special protection society affords to the marriage relationship," "the close emotional ties between husband and wife" (Br. 38), and the fact that in modern times "the husband and wife have grown closer together as an emotional, social, and cultural unit" (Br. 41). We think that there is no need for this Court in this case to decide the broad, abstract, general question mooted in petitioners' brief. In our view, the privilege of a party to prevent his *spouse's* testimony against him—accepting the privilege at its traditional value and ignoring the powerful arguments against its continued existence—was in no meaningful sense offended in this case. We believe this conclusion is compelled when the problem is defined precisely in the context of the circumstances from which it arises.

It is important to note at the outset that the

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[30] As petitioners acknowledge (Br. 33), the privilege in issue here "is to be distinguished from the privilege against the disclosure of confidential communications between husband and wife."

marital privilege petitioners invoke requires consideration only with respect to the testimony of Bess Osborne, the purported wife of petitioner Munio Knoll, and possibly with respect to Grace Klemtner, alleged wife of the acquitted defendant, Leopold Knoll. In a passage which goes far to demonstrate how removed this case is from any semblance of the supposed realities which give rise to the privilege in the first place, petitioners suggest (Br. 15-16) that "insofar as this problem relates to the competency of Maria [Knoll or Lutwak] as a witness, the marital status of Maria and Munio is involved." This ignores the fact that, though Maria and Munio had been married, Munio expressly disclaimed any objection to her testimony at the trial (R. 50-52). It ignores the rule, elsewhere acknowledged by petitioners (Br. 32, 35) that the privilege is personal to the spouse against whom the testimony is offered. See *Griffin* v. *United States*, 336 U. S. 704, 714; 8 Wigmore, *Evidence* (3d ed.) § 2242. More importantly, petitioners overlook that, if they were to make any semblance of a defense to the charges against them, the disclaimer by Munio was essential, for on their theory (1) Maria was, when she entered the United States, the war bride of Lutwak, not Munio's wife, and (2) Munio was the war bridegroom of Bess Osborne, hardly in a position to claim the privilege against Maria's testimony. As for Lutwak, he had divorced Maria before the trial (R. 92, Govt. Ex. 19), and petitioners do not and could not claim the privilege on his behalf

(See R. 43; *United States* v. *Walker*, 176 F. 2d 564, 568 (C. A. 2), certiorari denied, 338 U. S. 891; *Yoder* v. *United States*, 80 F. 2d 665 (C. A. 10); 8 Wigmore, *Evidence* (3d ed.) § 2237(2), pp. 249-250).

Passing Maria, then, the next of the three alleged spouses in question is Bess Osborne. The problem, as we view it, may be resolved by focusing on the state of the record when this witness was called to testify. For if at this point the trial court was correct in concluding that there was no basis in fact for the privilege because the marriages were "mockeries," he could certainly have been no less correct at the much later point when Grace Klemtner was called, after the sham character of the marriages the scheme intended had been more conclusively demonstrated. So, even apart from the fact that Leopold Knoll's acquittal may render academic the question of privilege against the testimony of his alleged spouse Grace Klemtner, it seems appropriate to discuss the present point in terms of the facts bearing on Bess Osborne. It may be noted, however, that the argument which follows, while its particular factual details refer to the case of Osborne, applies equally, *mutatis mutandis*, to the testimony of Grace Klemtner insofar as that testimony may be in issue.[31]

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[31] It makes no difference in this respect that the jury acquitted Leopold Knoll, very possibly in the belief that his marriage to Grace Klemtner was genuine. As petitioners insisted at the trial (R. 225), the question of competency was for the judge, not the jury. As we show more fully under Point III, pp. 57-66, *infra*, the propriety of the judge's determination on this score is in no way altered by the fact that the jury, bound

In their argument (Br. 38-41), petitioners outline and rely upon the bases in social policy which are thought to justify the privilege of a party against his spouse's unfavorable testimony. In a word, as petitioners' brief makes clear, the policies involved may be summarized as (1) that of preserving marital harmony against the suspicion and acrimony which might be engendered by testimony of one spouse against another, and (2) the almost inseparable belief that basic notions of fairness revolt against permitting a wife and husband, tied by emotional bonds of the most profound intimacy, to be the means of each other's betrayal. See 8 Wigmore, *Evidence* (3d ed.) § 2228. The evidence in this case, before the claim of privilege was asserted, amply demonstrated that no such considerations were present here. For the testimony had already shown that there was no "marriage" involved in any sense which could make the asserted privilege relevant. Upon powerful evidence that the "marriage" in question had consisted of nothing but a ceremony and a single representation for ulterior purposes that Knoll and Osborne were husband and wife— with no cohabitation, no consummation, no emotional ties of any kind, and no remote intention that any such ties should ever be established— the trial judge properly concluded that the marriage was a "mockery" and afforded no basis for the privilege.

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by the greater requirements of proof for conviction, may have resolved the underlying factual issue, as it bore on the merits rather than on competency, the opposite way.

Before Osborne was called as a witness, there had been a cumulation of testimony proving the nature of the scheme and the character of the relationship between Knoll and Osborne upon which petitioners rely. The evidence had shown how petitioner Treitler had sought out an ex-servicewoman in this country to go to Paris, go through a marriage ceremony with her brother Munio Knoll, present him to the immigration officials as her spouse, receive a fee, obtain a divorce, and have done with the transaction. There was testimony (clearly admissible against Knoll on any theory) that Knoll had boasted how money, the "right connections," and know-how made an alien's entry into the United States easy (*supra*, p. 10). There was evidence that Munio had, after his entry, represented Maria, not Bess Osborne, as his wife, and that Maria was known to Knoll's friends as "Mrs. Knoll" (*supra*, pp. 10, 11). In his own statement, admitted only against him (R. 185), Knoll stated that he had never had sexual relations with Bess Osborne and had separated from her promptly upon their arrival in the United States (*supra*, p. 13).

In this state of the record, we think the trial judge's decision to admit the testimony of Bess Osborne as a witness was clearly correct.[32] By way of a "marriage" upon which to base his claim of privilege, Munio Knoll could offer only a formal ceremony and a certificate, a pair of empty forms,

[32] That the ruling on competency was made by the judge, and not left for the jury, see note 35, p. 58, *infra*.

a paper facade erected only to deceive the immigration authorities. Against the showing was a powerful array of evidence that the harmony which the privilege was designed to protect had clearly never existed and was never intended to exist. The purported marriage upon which the claim of privilege was predicated was, in every sense which bears in any significant way on the availability of the privilege, no marriage at all.

Speaking of a substantially identical "marriage," similarly arranged for the sole purpose of effecting an alien's immigration and similarly intended to end with the accomplishment of that purpose, Judge Learned Hand wrote for the Second Circuit (*United States* v. *Rubenstein*, 151 F. 2d 915, 918-919, certiorari denied, 326 U. S. 766):

> [The purported spouses] were never married at all. Mutual consent is necessary to every contract; and no matter what forms or ceremonies the parties may go through indicating the contrary, they do not contract if they do not in fact assent, which may always be proved. * * * Marriage is no exception to this rule: a marriage in jest is not a marriage at all. This is the law of New Jersey as well as elsewhere. McClurg v. Terry, 21 N. J. Eq. 225; Girvan v. Griffin, 91 N. J. Eq. 141, 108 A. 182 (semble). It is quite true that a marriage without subsequent consummation will be valid; but *if the spouses agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has*

> *served its purpose to deceive, they have never really agreed to be married at all.* They must assent to enter into the relation as it is ordinarily understood, and it is not ordinarily understood as merely a pretence, or cover, to deceive others. [Emphasis added.]

This conclusion is squarely applicable here. It does not matter that in some abstract way the marriage may not have been "void" for all conceivable purposes. It is irrelevant to speculate whether the motions Bess Osborne and Munio Knoll made in a Parisian ceremony may have resulted in a "marriage" which could in some sense be deemed "valid." (*cf.* pp. 66-74, *infra.*) All that matters is that, in every sense which is conceivably relevant to the privilege Knoll asserts, there was no marriage here. The privilege claimed derives from American law; it is invoked in an American court; it rests upon notions of policy which have their only possible significance with reference to the marital "relation as it is ordinarily understood" in the law and morals of this country (and probably of France as well, though petitioners complain, mistakenly we think, that this was not proved in their trial; see pp. 66-74, *infra*). The facts to which the policies in question apply and for which the privilege is designed are absent in this case. There was no ground in these facts, in reason, or in precedent for Knoll's invocation of the privilege.

It has never been the law that having once gone through a marriage ceremony with a witness who is

called to testify against him, a party is always and necessarily able to preclude that witness' testimony. It is settled, for example, that divorce ends the privilege, for, where there has been a divorce, "there is no home life the peace and serenity of which may be destroyed." *United States* v. *Gonella*, 103 F. 2d 123, 124 (C. A. 3). Similarly, though the hoary reason which has been formulated to explain it is different, the exception to the privilege for cases where one spouse is charged with a personal wrong against the other (*e.g.*, *Hayes* v. *United States*, 168 F. 2d 996 (C. A. 10)) makes sense mainly as a recognition that the harmony and peace the privilege cherishes are at best attenuated in the case of "the wife who [illegible]en beaten, poisoned, or deserted * * *." 8 Wigmore, *Evidence* (3d ed.), § 2239, pp. 251-252; see Clark, J., dissenting in *United States* v. *Walker*, 176 F. 2d 564, 569 (C. A. 2), certiorari denied, 338 U. S. 891. But the divorce cases alone are sufficient authority to defeat petitioners' argument. If divorce ends the privilege in the case where a "home life" and marital "peace and serenity," which once presumably existed, have ended, what basis is there for recognizing the privilege where these normal incidents of "marriage" have never existed and were never intended, and where even the formal certificate of marriage is to be nullified at the parties' earliest convenience after it has served its deceptive purpose?

Surely, the common law, "interpreted * * * in the light of reason and experience" (Rule 26, F. R.

Crim. P.) requires no such bizarre result. Indeed, petitioners, despite their eloquent defense of the privilege as a general proposition—implicity invoking the normal facts of marriage as ordinarily understood, to which the policies of the privilege apply—point to no authority for the extension of the privilege they seek.[33] We submit that, whatever the future of the privilege in the federal courts may be, the courts below were clearly correct in denying its application here.[34]

[33] There are state cases which of course are not controlling on this Court, holding that a marriage which may have been contracted for the purpose of precluding the spouse's testimony constitutes a basis for invoking the privilege. *E.g.*, *State* v. *Chrismore*, 223 Ia 957; *Moore* v. *State*, 45 Tex. Cr. 234; *Cole* v. *State*, 92 Tex. Cr. 368. It does not appear in these cases, as it does here, that the parties never intended to live together and that the marriage was intended to be dissolved as soon as it had served its ulterior purpose. Indeed, it has been indicated, even by a court following this view, that the result might be different where it was shown that the parties to the marriage had no intention of assuming normal marital relations. and went through a marriage ceremony solely as "a fraudulent scheme * * * to thwart the administration of justice." *State* v. *Frey*, 76 Minn. 526, 530. Moreover, the rule appears to stem largely from cases where the defendant is charged with a crime against his wife before marriage (for example, rape or seduction) so that the marriage in such cases operates as a condonation. *E.g.*, *State* v. *Frey*, *supra*; *Doss* v. *State*, 156 Miss. 522; *Kaul* v. *State*, 43 Okla. Cr. 56. Obviously, in cases where the wife has married the defendant subsequent to the alleged crime against herself, there is some reason to assume a basis for the harmony and intimacy which give rise to the privilege.

[34] While the decision below rests (R. 413), as an alternative ground, upon the argument we urge here, the court devoted a considerably larger portion of its opinion to the view that the privilege petitioners assert is, "in the light of reason and experience," ripe for discard as far as the federal courts are concerned. We believe that this view, which has been pressed with persuasive vigor since at least the time of Jeremy Bentham's strictures, would merit favorable consideration were the problem reached here, for the reasons outlined by the court

III

Where the Trial Judge Has Properly Rejected a Claim That a Witness Is a Party's Spouse and Permits Her to Testify against Him, the Witness May Testify as to Any Material Facts, Including Facts Showing That She Is Not the Party's Spouse

Relying upon the decision in *Miles* v. *United States*, 103 U. S. 304, petitioners argue (Br. 41-43) that a witness, once alleged to be a party's spouse, may never, even after the allegation has been rejected and the witness has been admitted to testify, give evidence disproving the existence or the genuineness of the alleged marriage. This argument presupposes that the trial judge's ruling against the claim of privilege is correct, for the question is not reached otherwise. Petitioners do not question, but on the contrary have insisted throughout (see, *e.g.*, R. 225; *cf.* Pet. Br. 42-43), that the factual issues to be determined in resolving a claim that a witness is a party's spouse and cannot testify against him are for the court, not the jury. See 2 Wigmore, *Evidence* (3d ed.) § 487; 9 *id.* §2550; *Gila Valley Ry. Co.* v. *Hall*, 232 U. S. 94, 103. What they argue is that, where a factual issue so determined by the judge in permitting the witness to testify is also a material issue in the lawsuit,

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below (R. 406-413). The facts of this case, however, so clearly precluded the claim of privilege on grounds wholly consonant with the old common-law rule as to render unnecessary resolution of the broader question decided by the court below. But we would urge further that, if the privilege at common law could be deemed to extend to a case such as this, the privilege should at least to that extent be narrowed in the federal courts.

the witness may not thereafter testify as to that issue.[35]

The rule for which petitioners contend is without justification in reason, and petitioners attempt no such justification. We think the precedent petitioners invoke, *Miles* v. *United States, supra,* is probably distinguishable on its facts. We submit further, however, that if the decision in *Miles* requires the result for which petitioners contend, that decision should not be followed here. For, in the event *Miles* necessarily means what petitioners say it means, we respectfully urge that so anomalous a result on the narrow issue in question, long

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[35] Petitioners suggested at the trial (R. 225), and the suggestion appears to be renewed in their brief here (pp. 42-43), that the judge was passing on to the jury his own function of determining whether the marriages were genuine in order to decide whether the testimony of the alleged spouses could be received. But it is clear from the record that the trial judge made the determination as to competency himself and that, when he agreed (R. 188) that he was leaving it to the jury to decide the question whether the marriages were valid, he referred to this question as it bore on the merits of the case. As to his own finding on the question for purposes of ruling whether the alleged spouses could testify, he plainly indicated, when Bess Osborne was called, his conclusion that the marriage was a "mockery" and could not sustain the claim of privilege (R. 189). Later, when Grace Klemtner was called, he repeated this conclusion even more firmly, again referring to the jury's task of passing on this factual issue on the merits (R. 225). Finally, if it could be doubted that he determined the competency issue himself and did not leave it to the jury, it seems decisive that the trial judge never instructed the jury to make any such determination—or even that such a determination was necessary.

We think it unnecessary, however, to explore in detail the trial court's mental processes with respect to this problem. For it is plain, in any event, that the effect of the trial court's action was to make the ruling on the claim of privilege which was his to make. As to the correctness of the ruling, see pp. 48-56, *supra*.

obscured (at least in the federal courts) by the absence of need for reexamination, does not merit a revived and expanded tenure in the law.

A. *The asserted rule, that a witness found competent by the court may not testify on material factual issues which happen to coincide with issues affecting the witness' competency, has no basis in reason.*

Where a contested factual issue bearing on competency is also a material issue in the lawsuit, judge and jury have sharply distinguishable functions. The judge must determine the issue before the jury may hear the witness at all. If the witness is found to be competent and then testifies on this same factual issue, the jury is concerned, not with competency, but with the weight of the evidence, along with other evidence, as it bears on the issue in question. If the witness serves to persuade the jury to the same view the judge took on the factual issue, the witness is in a sense persuading the jury of his competency. But this consequence is the most academic of abstractions, for the jury is not determining competency.[36] And the problem is no different because the jury may resolve the issue contrary to the judge's finding. As the Reporter for the American Law Institute's

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[36] To be distinguished from this ordinary situation is the exceptional case, such as one where a confession is involved, in which the jury in effect reconsiders the judge's ruling that evidence is admissible. As petitioners have insisted throughout (See, R. 225), the question of admissibility in this case was solely for the court.

Model Code of Evidence has written (Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 Harv. L. Rev. 165, 188 (1929)):

> * * * There is * * * no requirement at all that judge and jury shall agree on ultimate facts. Consistency or inconsistency between a preliminary finding by the judge and a final determination by the jury would therefore be entirely immaterial, even if the two findings were made for the same purpose. The judge, however, is ruling for the purpose only of determining whether the jury shall hear the evidence, and the rules which govern him in reaching his conclusion may be quite different from those governing the jury in its deliberation. For example, a person of normal intelligence is *prima facie* competent as a witness. He who objects has the burden of persuading the judge of the specific incompetence which he alleges. Hence, if the mind of the judge is in equilibrium on the question, he must decide in favor of competency. Thus he may let in the alleged interested survivor's testimony because he cannot make up his mind whether the witness falls within the prohibition. The jury, however, will have to find by a preponderance of the evidence that the contract was made, in order to find for the plaintiff. And if plaintiff's only evidence is that the contract was made through *X*, then assuming the court and jury to be in absolute accord on the facts, their findings would have to be different.

Coming to the particular problem of this case, where an alleged wife has been found by the judge not to be a wife and she is therefore permitted to testify against a defendant claiming to be her husband, her testimony may range through the most damaging of conceivable facts. She may testify that she saw him kill the victim, spend the stolen money, forge the bogus check. Her testimony on all such potentially fatal issues is neither excluded nor discredited because of the rejected assertion that she is the defendant's wife. It is impossible to perceive why she should be any less competent to testify to a fact so peculiarly likely to be within her knowledge—the fact that she is not the defendant's wife.

We think the answer to petitioners' argument in this case is the answer the Supreme Court of Georgia gave in *Hoxie* v. *State*, 114 Ga. 19, 21, where the court said:

> If the woman was the wife of the accused, she was, of course, incompetent to testify; but if not, she could testify as any other witness. She, of all others, knew what the truth of this matter was, and there is no reason, either in law or logic, why she should not have been allowed to state under oath whether or not she had ever been married to the accused.[37]

[37] It is not altogether clear in *Hoxie* v. *State* whether the trial judge ruled as to competency before permitting the witness in question to testify. But this problem, absent from the instant case (see note 35, p. 58, *supra*; *cf.* pp. 63-64, *infra*), scarcely lessens the relevance of the decision here. If anything, it makes the decision a more extreme rejection of petitioners' argument than is required.

B. *The decision in Miles* v. *United States is distinguishable; it should not in any event lead to the anomalous result petitioners seek*

Miles v. *United States* was a prosecution for bigamy. There was evidence tending to show that the defendant, a Mormon, had married three women on a single day and that it had subsequently been determined to denominate these wives "first," "second," and "third" in order of age. An applicable statute of the Territory of Utah forbade testimony by spouses for or against each other.

There was no dispute as to the marriage with the "second" wife, the only issue on the trial, contested throughout, being the fact of the previous marriage. Called as a witness for the prosecution, over defendant's objection, the second wife gave testimony tending to prove the first marriage. Reversing the judgment of conviction, the Court said (at p. 313):

> As [the alleged second wife's] competency depends on proof of the first marriage, and that is the issue upon which the case turns, that issue must be established by other witnesses before the second wife is competent for any purpose. Even then she is not competent to prove the first marriage, for she cannot be admitted to prove a fact to the jury which must be established before she can testify at all.

On its face the quoted language undeniably supports the position petitioners press here. There are factual distinctions between the cases, however,

which argue against extension of that language to the present situation.

1. Statements in the *Miles* opinion strongly indicate that the Court was not convinced of the adequacy of the trial judge's preliminary ruling on competency. At the outset of the passage from which we have quoted (at p. 313), the Court said:

> The testimony of the second wife to prove the only controverted issue in the case, namely, the first marriage, cannot be given to the jury on the pretext that its purpose is to establish her competency.

In the next sentence, the opinion pointed out that the issue as to the first marriage "must be established *by other witnesses* before the second wife is competent for any purpose." (Emphasis added.) Later in the opinion the Court said (at p. 315):

> In this case the injunction of the law of Utah, that the wife should not be a witness for or against her husband, was practically ignored by the court.

And finally, the Court said that (*ibid.*)

> the evidence of a witness, *prima facie* incompetent, and whose competency could only be shown by proof of a fact which was the one contested issue in the case, was allowed to go to the jury to prove that issue *and at the same time to establish the competency of the witness.* [Emphasis added.]

These passages indicate, we think, that the Court was not persuaded that the trial judge had performed his duty to determine, in advance of the questioned witness' testimony and from other witnesses, the competency of the witness to testify at all. The evidence had shown that the type of Mormon marriage ceremony in question was highly secret and that the persons officiating at such ceremonies were sworn to conceal the facts. 103 U. S. at 315. The Court observed that these facts and the rule against spouses' testimony made proof of bigamy practically impossible in Utah. *Ibid.* In the circumstances, the Court was apparently of the view that the trial judge, having "practically ignored" the prohibition against a spouse's testimony, had permitted the witness to testify, not only to prove the contested fact to the jury, but "at the same time to establish the competency of the witness." P. 315.

As we have shown, there is no comparable problem in the present case. Here, on ample evidence wholly apart from and preceding the testimony petitioners complain of, the court had found that there were no genuine marriages and that the witnesses were therefore competent.

2. Under the statute involved in *Miles*, a wife could not testify either for or against her husband. It followed that an alleged second wife of a defendant prosecuted for bigamy, as the Court's opinion shows (pp. 313-315), could not logically give favorable evidence regarding the alleged first mar-

riage—*i. e.*, evidence to disprove the existence of the first marriage and, therefore, the absence of bigamy—for such testimony would argue against her competency to testify at all. Relying on authorities which made this problem clear, the Court simply extended the rule, as Greenleaf did in the passage the Court quoted (pp. 314-315) to exclude testimony either way on a contested issue as to a first marriage.

Insofar as the problem of incompetency to give favorable testimony may explain the result in *Miles*, there is, of course, no longer any reason for a similar result. *Funk* v. *United States*, 290 U. S. 371.

Whatever significance the Court may attach to the factual distinctions between *Miles* and the instant case, the result for which petitioners contend under *Miles* should in no event be applied to the situation presented here. On the limited issue under consideration, the rule in the *Miles* case has had an inconspicuous history. Our research discloses no comparable results in later federal cases.[38]

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[38] Petitioners cite *Matz* v. *United States*, 158 F. 2d 190 (C. A. D. C.), as a recent decision in which the *Miles* case was "acknowledged to be the law * * *" (Br. 41). But *Miles* was invoked in that case for two wholly dissimilar and far less esoteric propositions than the one which concerns us here: (1) "That * * * a marriage might be proven like any other fact, by the admissions of the defendant, or by circumstantial evidence." Pp. 191-192. (2), That, where an alleged wife in a second, bigamous marriage was called as a witness, it was for the trial judge to determine her competency by deciding "whether the first marriage was established by the proof offered to his satisfaction." P. 192.

If anything, the *Matz* case departs from the rule of *Miles* for which petitioners cite it. For in *Matz*, the alleged second

We believe, for reasons already stated (pp. 59-61, *supra*), that if there ever was a reason for the rule petitioners would apply to this case, the reason has long since disappeared. Accordingly, if the *Miles* decision must be read to require such a result, we respectfully submit that it should to this extent be limited to its peculiar facts.

IV

The Government Was Not Required to Prove That the Marriages Were "Invalid" Under French Law

The indictment charged (R. 4-7, 10, 11), as the jury was instructed (R. 333-335), that the defendants had conspired (1) to arrange the marriages solely for the purpose of misrepresenting the three couples to the immigration authorities as husbands and wives in order to effect the entries of the alien "spouses" as nonquota immigrants under the War Brides Act, and (2) to conceal from the immigration authorities this scheme and the fact that the parties to the purported marriages intended never to live together as husband and wife. Misconceiving the nature of this charge and of the fraud the evidence showed they conspired to commit, petitioners argue (Br. 44 *et seq.*) that the "government had the burden of establishing the invalidity of the Parisian marriages." Summarized briefly at the outset, we think the refutation to this argu-

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wife, having been found competent by the trial court, was permitted to testify that she had met the alleged first wife and had thought she was the appellant's sister—facts obviously touching on the issue as to the first marriage, the issue which in turn determined the witness' competency.

ment may be stated as follows: (1) The aliens in question were not "spouses" within the meaning of the War Brides Act; (2) invoking that Act, petitioners conspired to misrepresent the aliens as "spouses" within the Act and to misrepresent that the parties to the purported marriages intended to live together, demonstrating their awareness of the fraud and of the means by which it could be expected to succeed; (3) whatever "validity" the forms might have had for some conceivable purpose—under French or American or any other law—it was an integral part of the scheme that the forms themselves would be nullified for all purposes when they had served the single purpose of the parties of getting the aliens past the immigration officials. For these reasons, inquiry into French law, the bare forms of which petitioners employed only to practice fraud under American law, was wholly unnecessary.

1. It requires little discussion to show that, when Congress in the War Brides Act relaxed the restrictions of the immigration laws to admit "spouses" of World War II veterans, it did not intend the Act to benefit the type of "spouse" this case involves. Empty ceremonies and formal certificates of "marriage," designed only to bestow the title of "spouse" for long enough to take advantage of the Act, were clearly not the objectives Congress sought.

Written two years before the entries of the aliens in this case, the opinion of Judge Learned Hand in *United States* v. *Rubenstein*, 151 F. 2d 915 (C.A.

2), certiorari denied, 326 U. S. 766, is apposite here. In that case, as in this, there was a charge of conspiracy to obtain entry into the United States by false representations of material facts. There, too, seeking the benefits of a statute permitting the "spouse" of a citizen to enter the United States, the parties had arranged a "marriage" solely for that purpose—intending merely to represent themselves as married and to obtain a divorce when the benefit of the immigration statute had been realized. Rejecting the contention that there had been no unlawful conduct because the marriage was "valid," Judge Hand wrote (151 F. 2d at 918-919):

> * * * The statute condemns not only a false representation, but a "willful concealment of a material fact." § 180a, 8 U. S. C. A. [The appellant] knew that the parties proposed a divorce within six months, and that was a fact most material to the granting of the visa. The statute is not concerned with marriage, merely as marriage; one, perhaps the chief, reason why it allows the wife of a citizen to enter is because the husband will be responsible for her support. If the spouses at the time of the wife's entry intend that that responsibility shall end as soon as possible, they have evaded the statute by suppressing a material fact; and the suppression is a fraud, even though the marriage is valid. But, that aside, [the purported spouses] were never married at all. * * * It is quite true that a marriage without subsequent consummation will be

> valid; but if the spouses agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has served its purpose to deceive, they have never really agreed to be married at all.[39]

The problem of support after the alien's entry may be less significant under the War Brides Act than it was under the immigration statute considered in *Rubenstein*, but it is equally true in both cases that Congress meant by "spouse" something considerably more than a person who has gone through a marriage ceremony in order to get into the United States and intends with utmost dispatch thereafter to wipe out the formal vestiges of the ceremony by a divorce. Confirming what would be obvious in any event, the House and Senate reports on the bill which became the War Brides Act made explicit, in identical language, that Congress was moved to the legislation by the "strong equities [which] run in favor of * * * service men and women *in the right of having their families with them* * * *." H. Rep. 1320, 79th Cong., 1st Sess., p. 2; S. Rep. 860, 79th Cong., 1st Sess., p. 2 (emphasis added). "This was a bounty afforded by Congress not to the alien who had become the wife of an American but to the citizen who had honorably served his country." *Knauff*

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[39] While the marriage ceremony in the *Rubenstein* case had been performed in the United States, we show below (pp. 71-74) that this fact does not lessen the precise applicability of the court's reasoning to the facts presented here.

v. *Shaughnessy*, 338 U. S. 537, 548 (dissenting opinion of Mr. Justice Frankfurter). Concerned with "the deepest tie that an American soldier could form," the "Act is legislation derived from the dominant regard which American society places upon the family." *Id.*, at 548, 549. Surely nothing was farther from the statutory purpose than providing a means whereby soldiers could earn travel expenses and a fee for bringing unloved, unwanted, practically unknown "spouses" *pro hac vice* past the immigration barriers. The short of the matter is that "spouses" like the ones in this case, whatever they may have been under French law, were without a doubt not "spouses" within the meaning of the War Brides Act.

2. When they arrived at the borders of the United States, the alien "spouses" in this case expressly claimed the right to admission under the War Brides Act, each completing a form under oath headed "Application for admission to the United States as a nonquota immigrant under the Act of December 28, 1945" (Govt. Exs. 1, 2, and 3). Maria Knoll (Lutwak) and Munio Knoll, claiming to be married to petitioner Lutwak and Bess Osborne, respectively, stated on the application that they were going to live with these alleged spouses.[40]

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[40] Interesting among the facts which presumably distinguished Leopold Knoll, the acquitted defendant, in the minds of the jury is his failure to answer the "person-to-whom-destined" question fully on the form. He merely wrote in this space the address of his sister, Regina Treitler, giving no name (Govt. Ex. 3).

Thus, the aliens represented themselves to be spouses within the American statute, not only willfully concealing (as the jury found on overwhelming evidence) the facts which would have belied this representation (*United States* v. *Rubenstein, supra*), but affirmatively misrepresenting a fact the revelation of which might well have frustrated the objective of the conspiracy. Knowing they had represented for themselves a status which to the whole western world implies cohabitation, they falsely stated an intention to cohabit. Knowing they were claiming the benefit of an American law plainly designed to enable American soldiers to bring their alien families to live with them, they falsely represented that they had arrived to live with their soldier spouses.

3. Now petitioners argue that the marriages in question may in some sense have been "valid" under French law and that the Government's failure to prove the contrary somehow precluded the finding that they were guilty as charged. They do not question the sufficiency of the proof that, whatever the French law they invoke might conceivably be, they merely went through the forms, intending only the single effect that they would have a paper basis for representing themselves as "married." In other words, whatever consequences might supposedly follow from finding that the marriages were in some sense "valid" under French law, they were consequences which, the proof showed, petitioners neither desired nor intended, but planned to avoid utterly by arranging divorces promptly

after their scheme for entry into the United States had succeeded. In the circumstances, the fact that petitioners arranged the ceremonial motions in France makes no difference. What matters here, as it mattered in the Second Circuit's *Rubenstein* decision (where the marriage ceremony took place in the United States), is that the ceremony was an empty form—designed to deceive, employed to deceive, and thereafter to be discarded. Cf. *United States Bank* v. *Owens*, 2 Pet. 527, 536 ("a fraud upon a statute, is a violation of the statute"); *Austin* v. *Tennessee*, 179 U. S. 343, 359-361; *Gregory* v. *Helvering*, 293 U. S. 465, 469-470.

The fallacy of petitioner's thesis is illuminated to a considerable extent by a portion of their own argument. Turning from the contention that the Government's failure to prove "invalidity" of the marriages under French law vitiated the case against them, petitioners argue (Br. 47-48) that the marriages were in any event "valid" under American law. They write (Br. 47):

> The evidence, taken at its strongest for the government, indicated that the parties to the various marriages entered into them freely with a view to accomplishing the entry into the United States of the alien spouse in each marriage. Thereafter, they were to be terminated. Under the law of Illinois and most other states such marriages are not invalid. *The majority rule is that where a man and woman have gone through a marriage ceremony for the purpose of accomplishing a definite object, but pursuant to an understanding*

> *that after the marriage has been performed each party would go his own way and one of them would later seek a divorce or an annulment, such a marriage is valid; and most courts have refused to give effect to the intent of the parties that the marriage should be merely a matter of form.* [Citing cases; emphasis added.]

The pitfall, obviously, is the large word "valid." What petitioners have shown is that a court of equity, asked to bring a fraudulent scheme to a happy conclusion, will refuse. Thus, in the first of the cases petitioners cite at the end of the foregoing passage (*De Vries* v. *De Vries*, 195 Ill. App. 4, where the parties married only so that the woman could escape from a theatrical contract, agreeing to obtain an annulment thereafter), the lower court dismissed the bill "for want of equity on the ground that such an arrangement was against public policy." 195 Ill. App. at 5. Affirming this decision, the appellate court pointed out that to permit the result the parties sought "would convert the solemn rite of marriage into a delusion and fraud." *Id.* at 6.

It may be readily conceded that a court of equity would hold the marriages in this case "valid" in the sense that it would not help to "convert the solemn rite of marriage into a delusion and fraud" by clearing away for the parties the legal debris of their scheme.[41] But this scarcely aids

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[41] The parties in the instant case were careful not to take the courts so openly into their confidence. Both Lutwak, in

petitioners to show that, in the far different context of this case, the ceremonies they arranged were anything other than precisely "a delusion and a fraud". All petitioners have proved is that, without further concealments and misrepresentations, their conspiracy could well have failed in other ways than through the present prosecution.

And this is all that could conceivably be shown by the academic inquiry into French law upon which petitioners insist. Assume, for example, that the French ceremony would have created a "valid" marriage in the sense of making Bess Osborne unassailably the heir of Munio Knoll. And suppose Knoll had died immediately following that ceremony. Bess would have inherited and there would have been, from the viewpoint of at least some of the conspirators, a terrible mistake. But this means only that the conspirators may have risked legal consequences not only unsought, but shunned.

The same conclusion applies to any other concrete meanings of "validity" which may be imagined. The only important point is that, whatever a French marriage ceremony (or an American one, for that matter) is meant to signify in law, the ceremony was employed by petitioners only for the fraudulent purpose of representing the aliens as "spouses" entitled to enter the United States under the War Brides Act. French cere-

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divorcing Maria, and Bess Osborne, in divorcing Munio Knoll, merely alleged desertion, omitting the details of the plan the record proves (R. 92, Govt. Ex. 19; R. 215, Dft. Romankiewicz Ex. B, and note 14, p. 16, *supra*).

monies are no more effective than American ceremonies to excuse such a fraud against American law.

V

The Trial Court Was Not Required in the Circumstances of This Case to Charge That a Second Marriage Is Presumed to Be Valid Where a Prior Marriage to a Spouse Still Living Has Been Shown

It was undisputed at the trial that petitioner Munio Knoll, who had entered the United States as the spouse of Bess Osborne, had been married in 1932 to Maria, who entered as the spouse of petitioner Lutwak. In his statements to the immigration authorities, which were in evidence, Munio first declared that he and Maria had been divorced by a court in Budapest. Later, he changed this statement and asserted that there had been a "Jewish divorce," not a civil decree (*ibid.*). Though he gave assurances that he could produce the divorce document, he never did, either for the immigration authorities or at the trial of this case. The certificate of the marriage between Munio and Bess Osborne, while it showed that she had been previously married and divorced, gave no similar information as to him (note 10, p. 12, *supra*). The Government proved, finally, that after their arrival in the United States, Munio and Maria lived together and represented themselves as husband and wife.

On this record, petitioners err in their assertion (Br. 50, 51-52) that there was no evidence to warrant the sentence in the trial court's instructions

to the jury (R. 339) charging that a bigamous marriage is void. Equally mistaken is the contention (Br. 50-51, 54) that the court should have further charged that a second marriage is presumed to be valid even to the extent of presuming a valid divorce from a prior spouse who is shown to be still alive.

The presumption petitioners invoke applies in civil cases where a marriage is collaterally attacked, ordinarily where the party to the bigamous or otherwise tainted marriage is not before the court, and where there are obviously no considerations of convenience or policy to weigh against the assumption that a solemn ceremony of marriage is valid.[42] It is settled everywhere, however, that, in prosecutions for bigamy or adultery, where the marriage (the first marriage in bigamy cases) has been proved and where the defendant's spouse in that marriage is shown to be alive, there is no presumption of divorce and no burden upon the prosecution of proving the sweeping negative proposition that there has been no divorce.[43] In such cases,

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[42] Even in civil cases, it is highly questionable whether the presumption petitioners invoke would have been available in a case where the evidence pointed as strongly to an undissolved first marriage as did the evidence here. In the case of *In re Estate of Dedmore*, 257 Ill. App. 519, upon which petitioners rely (Br. 52, 54), the court said (at 523): "As soon as evidence is produced which is contrary to the presumption, the presumption vanishes entirely." But since, as we show immediately below, the presumption never comes into play in a criminal prosecution like the one in this case, it seems unnecessary to show at length that the instruction petitioners sought would, on still further grounds, have been improper.

[43] *Fuquay* v. *State*, 217 Ala. 4; *People* v. *Stokes*, 71 Cal. 263, 266; *People* v. *Huntley*, 93 Cal. App. 504; *State* v. *Martinez*, 43

the defendant before the court is obviously in the best possible position to prove that there has been a divorce, and the courts have consistently refused to assign to the prosecution the enormous burden of proving the contrary.

Summarizing the uniform rule, the Supreme Court of Indiana has written (*Fletcher* v. *State*, 169 Ind. 77, 78-79):

> * * * Public policy, social convenience and safety often justify a resort to certain presumptions, and for such reasons a presumption of the validity of a marriage duly solemnized has been indulged in collateral proceedings of a civil nature involving private rights. [Citing cases.]
>
> In a criminal charge of bigamy, brought by the State against a party to the marriage assailed, there is no occasion for resorting to presumptions, and we find no authority to sustain the doctrine for which appellant contends. In such case the accused has opportunities, above all others, of knowing whether a divorce has been granted, and if so, where proof of the fact may be obtained. Public policy and convenience do not require the State, in this class of cases, to search all records extant for proof of a negative fact peculiarly within the knowledge of the defendant; but when the State shows that the accused has been

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Idaho 180; *People* v. *Spoor*, 235 Ill. 230; *Fletcher* v. *State*, 169 Ind. 77; *Lesueur* v. *State*, 176 Ind. 448; *Long* v. *State*, 192 Ind. 524; *State* v. *Barrow*, 31 La. Ann. 691; *Comm.* v. *Boyer*, 7 Allen (Mass.) 306; *Bennett* v. *State*, 100 Miss. 684; *State* v. *Pinson*, 291 Mo. 328; *Fleming* v. *People*, 5 Park. Crim. Rep. 353, affirmed, 27 N. Y. 329; *State* v. *Herron*, 175 N. Car. 754.

> married to a woman who was still living at the time of his second marriage to another, it is incumbent upon him to show a divorce from such former wife.

This rule for criminal prosecutions was plainly applicable under the evidence here.[44] Munio's prior marriage, the fact that Maria was still alive, and evidence that Maria and Munio had held themselves out as married to each other were all before the jury. Against this damaging testimony, Munio offered only shifting stories of divorce and a promise, never fulfilled, to produce a document proving that divorce. In the circumstances, there was no occasion for a charge to the jury that there was a presumption that Maria and Munio had been divorced.

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[44] Cited by petitioners as being "perhaps most directly in point" (Br. 52), the decision in *Prentis* v. *McCormick*, 23 F. 2d 802 (C. A. 6), is of no help to them. There, on an appeal from the granting of habeas corpus to an alien held for deportation, ruling only on the facts as shown in the pleadings, the court rejected the contention that the alien's second marriage had to be deemed to be bigamous. The pleadings showed that the alien had first been married in 1911 and that the second marriage under attack had occurred in 1921. There was no showing of the critical fact, uncontroverted in the instant case, that the spouse in the first marriage was still alive—a showing which is, of course, required where bigamy is to be proved and which, when it is made, renders unnecessary the proof of divorce by the prosecution or presumption upon which petitioners insist. Accordingly, in ruling that the pleadings did not show bigamy and in referring to the "presumption of validity" which attaches to a marriage ceremony, the court was at most giving effect to the rule, irrelevant here, that a spouse absent and unheard from for a period of years (seven at common law, but varying under the bigamy statutes) may be presumed to be dead. See *Parker* v. *State*, 77 Ala. 47, 51-52; *People* v. *Huntley*, 93 Cal. App. 504, 506.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgments of the Court of Appeals should be affirmed.

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